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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 871

UPCHURCH PACKING COMPANY, INC.,
Petitioner,

vs.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

JOSEPH B. BRENNAN,
Counsel for Petitioner.

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	4
Reasons for granting the writ:	
I. The decision of the Circuit Court of Appeals for the Fifth Circuit is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Interwoven Stocking Co.* v. *United States*, 144 F. (2d) 768	5
II. The decision of the Circuit Court of Appeals is probably in conflict with applicable decisions of this Court	6
Conclusion	9
Appendix	10

CITATIONS

Cases:

Anniston Mfg. Co. v. *Davis*, 301 U. S. 337	6
Anniston Mfg. Co. v. *Davis*, 87 F. (2d) 773	8
Becker Steel Co. v. *Cummings*, 296 U. S. 74	8
Brinkerhoff-Faris T. & S. Co. v. *Hill*, 281 U. S. 673	7
Cummings v. *Deutsche Bank*, 300 U. S. 115	8
Ettor v. *Tacoma*, 228 U. S. 148	7
Graham v. *Goodcell*, 282 U. S. 409	7
Interwoven Stocking Co. v. *U. S.*, 144 F. (2d) 768	5
Lynch v. *U. S.*, 292 U. S. 571	8
Roomberg v. *U. S.*, 40 F. Supp. 621	7
United States v. *Butler*, 297 U. S. 1	3

Statutes:	Page
Agricultural Adjustment Act of 1933	2
Judicial Code:	
Sec. 24(20)	7
Sec. 240(a)	2
Revenue Act of 1936:	
Title VII	3
Sec. 902	4, 6, 7, 8, 10
Sec. 903	7, 11
Sec. 904	7, 11
Sec. 905	7, 12
Sec. 906	12
Sec. 910	12
Sec. 913	12
Revised Statutes:	
Sec. 3220	7
Sec. 3226	7
Sec. 3477	3

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To the Honorable, the Supreme Court of the United States:

Upchurch Packing Company, Inc., respectfully prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit, entered in the above entitled cause on November 20, 1945, affirming the judgment of the United States District Court for the Northern District of Georgia.

Opinions Below

The opinion of the District Court (R. 10-15) is reported at 53 F. Supp. 791. The opinion of the Circuit Court of Appeals (R. 21-28) is reported at 51 F. (2d) 983.

Jurisdiction

The judgment of the Circuit Court of Appeals for the Fifth Circuit was entered on November 20, 1945 (R. 28-29). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec. 347 (a)).

Question Presented

Where processing taxes imposed under the unconstitutional Agricultural Adjustment Act of 1933 were collected from Petitioner's predecessor corporation, an abattoir, which slaughtered hogs for Petitioner for a fee, and the amount of such taxes was charged to and borne by Petitioner, and where thereafter, but prior to the enactment of the Revenue Act of 1936, the abattoir transferred all of its assets to Petitioner, pursuant to a plan of reorganization, and thereafter dissolved, is Petitioner entitled to recover the illegal exaction on a claim for refund timely filed by Petitioner?

Statutes Involved

The applicable statutory provisions are set forth in the Appendix, pp. 10, *infra.*

Statement

This action was brought by Petitioner in the District Court to recover custom processing taxes illegally collected, under the Agricultural Adjustment Act of 1933 (48 Stat. 31), from Petitioner's predecessor corporation, Atlanta Butchers Abattoir, hereinafter called the "Abattoir". Respondent filed a motion for judgment dismissing the complaint upon the ground that the complaint did not state a claim against Respondent upon which relief could be granted (R. 9). The District Court, holding that Peti-

tioner was not entitled to recover upon the basis of the facts alleged in the complaint, entered judgment dismissing the complaint (R. 15-16), and the Circuit Court of Appeals affirmed this judgment (R. 28-29).

The following facts are alleged in the complaint, the legal sufficiency of which is denied by the judgment of the court below:

In 1933, 1934 and 1935 the Abattoir slaughtered hogs for Petitioner and paid to the Collector of Internal Revenue "custom" processing taxes under the Agricultural Adjustment Act of 1933 (R. 3, 4-5). The Abattoir collected the amount of such taxes from Petitioner by adding it as a specific item to the customary fee for slaughtering (R. 6). Petitioner in turn bore the burden of the tax and did not shift the burden to others (R. 6-7).

In December 1935, pursuant to a plan of reorganization, Petitioner acquired all of the assets and assumed all of the liabilities of the Abattoir, and the Abattoir was thereafter dissolved (R. 3-4). At all times W. F. Upchurch was sole stockholder of both corporations (R. 3).

The processing tax was held invalid by this Court on January 6, 1936. *United States* v. *Butler*, 297 U. S. 1. On June 22, 1936 the Revenue Act of 1936 was enacted, and Title VII of that Act imposed certain restrictions on refunds of processing taxes (49 Stat. 1648, 1747).

On June 30, 1937, within the time prescribed by law, Petitioner filed a claim for refund of processing taxes paid by the Abattoir, and after disallowance of the claim by the Commissioner of Internal Revenue this action was commenced (R. 7).

The Government conceded (R. 11) that the assignment of the claim for taxes paid by the Abattoir, in connection with the corporate reorganization, did not violate the prohibition of Section 3477 of the Revised Statutes, relating

to the assignment of claims against the Government. The Circuit Court of Appeals held that Petitioner was not entitled to recover because it construed Section 902(a) of the Revenue Act of 1936 as limiting refunds to claimants who paid the tax to the Government, and as denying any recovery to a taxpayer's lawful assignee who bore the burden of the tax.

Specification of Errors to Be Urged

The Circuit Court of Appeals erred:

1. In holding that the complaint failed to state a cause of action, and in affirming the judgment of the District Court dismissing the complaint.

2. In holding that Petitioner was not a "claimant" within the meaning of Section 902 of the Revenue Act of 1936 because the tax was not paid to the Collector by Petitioner, but by Petitioner's predecessor corporation and lawful assignor.

3. In failing to hold that if Petitioner was not a "claimant" within the meaning of Section 902 of said Act, Petitioner would be entitled to recover, without regard to the restrictions of said section, under the general provisions of law with reference to the refund of internal revenue taxes erroneously or illegally collected.

4. In holding that Congress, by virtue of the sovereign immunity to suit, undertook in Section 902 of the Revenue Act of 1936 to withdraw, *pro tanto,* the Government's consent to be sued.

5. In failing to hold that Section 902 of the Revenue Act of 1936 should be construed as simply denying refunds of processing tax, on the purely equitable ground of preventing unjust enrichment, to the extent that claimants have not borne the burden of the tax, but have shifted the burden to others.

6. In failing to hold that Petitioner had a vested right of action for the recovery of processing taxes illegally collected from its predecessor, and that this right could not be destroyed, under the circumstances of this case, without violating the due process clause of the Fifth Amendment to the United States Constitution.

Reasons for Granting the Writ.

1. The decision of the Circuit Court of Appeals is in conflict with the decision of the Circuit Court of Appeals for the Third Circuit in the case of *Interwoven Stocking Co.* v. *United States,* 144 F. (2d) 768.

In the *Interwoven Stocking Co.* case it appeared that a parent corporation was engaged in the business of selling and distributing the product manufactured by its subsidiary. The processing tax was imposed on and paid by the subsidiary, which in turn passed the tax burden on to the parent. After payment of the tax the subsidiary was merged into the parent. It was held that the parent, though not the taxpayer, was entitled to recover in its suit the processing taxes illegally collected from its subsidiary.

The court below, recognizing factual differences between the two cases, said:

> "But we agree with appellant that in substance the two cases are the same, and if we could agree with it that the (Interwoven Stocking Co.) case was well decided, we should agree with it that the judgment appealed from here should be reversed" (R. 27).

In both the *Interwoven Stocking Co.* case and the case at bar the tax was imposed on and paid by a corporation which passed the burden of the tax on to another corporation; the taxpayer-corporation ceased its separate existence after paying the tax; and the corporation that had borne the tax burden succeeded to all the property and rights of the taxpayer. In each case the claimant was not the taxpayer, but

acquired the taxpayer's right of action by lawful transfer or assignment. The equitable restrictions of Section 902 were held not to deny a refund to the claimant in the *Interwoven Stocking Co.* case, to the extent that the burden of the tax was borne by it and not shifted.

2. The decision of the Circuit Court of Appeals is probably in conflict with applicable decisions of this Court. The Circuit Court of Appeals reached its decision herein by giving to Section 902 of the Revenue Act of 1936 a construction inconsistent with this Court's construction of the same section in the case of *Anniston Mfg. Co.* v. *Davis,* 301 U. S. 337.

In the *Anniston* case, the plaintiff had sued for the recovery of processing taxes without meeting the restrictions on refunds imposed by Section 902. This Court was asked to hold that section invalid on the ground that it impaired the plaintiff's vested right of action to recover amounts collected from it as taxes under an unconstitutional statute. In answering the constitutional attack, this Court construed Section 902 as simply restricting refunds on the basis of the "same equitable principles that underlie an action in assumpsit for money had and received." That type of action, the Court said, "aims at the abstract justice of the case, and looks solely to the inquiry, whether the defendant holds money, which *ex aequo et bono* belongs to the plaintiff". 301 U. S. at 350. This Court said further:

> "Despite the broad language of Section 902, we do not think that it should be construed as intended to deny a refund in any case where a claimant is constitutionally entitled to it. We apply the same canon which makes it our duty, of two possible constructions, to adopt the one which will save and not destroy. We cannot attribute to Congress an intent to defy the Fifth Amendment or 'even come so near to doing so as to raise a serious question of constitutional law'." 301 U. S. at 351-352.

This Court therefore justified the impairment of the plaintiff's right of action in the *Anniston* case only in so far as it was subject to an equitable defense.[1] In the present case Petitioner had a vested right of action for the recovery of the processing tax paid by its predecessor and lawful assignor, and the Circuit Court of Appeals for the Fifth Circuit construed Section 902 as denying Petitioner any recovery, under circumstances where Petitioner had borne the burden of the tax and was not subject to any equitable defense.

The lower court's technical construction is strained and unsound. If, as the court below held, a "claimant" within the meaning of Section 902 is limited to a claimant who himself paid the tax to the Collector, then a recovery could never be allowed under Section 902 where the taxpayer is dead or dissolved and where the claim is prosecuted by the taxpayer's personal representative or statutory successor.[2] No such legislative intent could be reasonably inferred from the language of the section. Cf. *Roomberg* v. *United States*, 40 F. Supp. 621 (E. D. Pa.).

The court below took the position that the *Anniston* case "is not at all in point" because there suit was brought against the Collector, whereas the present action is against the United States (R. 25). But the statute must have the

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[1] If construed otherwise, the section would be invalid as impairing vested rights of action. *Graham* v. *Goodcell*, 282 U. S. 409, 429; *Ettor* v. *Tacoma*, 228 U. S. 148, 156. Due process of law requires some fair and effective remedy with reference to the illegal collection of taxes. *Brinkerhoff-Faris T. & S. Co.* v. *Hill*, 281 U. S. 673.

[2] If the word "claimant" in Section 902 should be given such a narrow construction, then the restrictions there imposed would not apply at all when a claim is prosecuted by the lawful assignee of the taxpayer. In such a case a refund should be allowed under general provisions of law relating to the refund of internal revenue taxes erroneously or illegally collected. See Revised Statutes, Secs. 3220, 3226 (26 U. S. C. A., Secs. 3770, 3772); Judicial Code, Sec. 24(20) (28 U. S. C. A., Sec. 41(20)); Revenue Act of 1936, Secs. 903, 904, 905 (49 Stat. 1648, 1747-1748).

same meaning in both suits; and the construction which this Court gave the statute in the *Anniston* case, in order to avoid constitutional doubts, must be just as controlling in a case like the present.

The Circuit Court of Appeals had no difficulty, with reference to constitutional doubts, in construing Section 902 in such a way as to deny recovery here, because it considered that no matter how harsh and arbitrary the restrictions of Section 902 might be, the section would still be valid as a withdrawal, *pro tanto*, of the Government's consent to be sued (R. 24-25).[3] It is submitted that Section 902 should not be construed as an assertion of the sovereign immunity to suit or as an imposition of conditions on which the Government consents to be sued. The section imposes restrictions on *refunds* whether "in pursuance of court decisions or otherwise". Congress was seeking in Section 902 to restrict the *right* to recover, as distinguished from the remedy, and it should not be inferred that Congress intended to raise the shield of sovereign immunity against any attacks on the validity of the restrictions. Cf. *Lynch* v. *United States*, 292 U. S. 571, 583, 585-587; *Becker Steel Co.* v. *Cummings*, 296 U. S. 74, 79-80; *Cummings* v. *Deutsche Bank*, 300 U. S. 115, 120.

The readiness of the court below to invoke the sovereign immunity to suit as an easy means of avoiding constitutional questions as to Government obligations is in marked contrast to the approach taken by this Court in similar cases. Cf. *Lynch* v. *United States, supra; Becker Steel Co.* v. *Cummings, supra; Cummings* v. *Deutsche Bank, supra.*

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[3] The same judge, writing the opinion of the Circuit Court of Appeals in the *Anniston* case, upheld the restrictions of Title VII on the same theory of sovereign immunity. 87 F.(2d) 773. In affirming the judgment, this Court relied in its opinion on the equitable basis of the restrictions of Section 902, as construed by this Court, and said that the judgment of the Circuit Court of Appeals was being affirmed "but upon the grounds stated in this opinion". 301 U. S. at 357.

In this aspect the present case is one of substantial public importance, involving governmental integrity, and calls for the exercise of this Court's supervisory powers.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOSEPH B. BRENNAN,
Counsel for Petitioner,
First National Bank Bldg.,
Atlanta, Georgia.